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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH FRANCIS HEFFERNAN, Defendant and Appellant.	D054111 (Super. Ct. No. SCD212791)

APPEAL from a judgment of the Superior Court of San Diego County, Roger W. Krauel, Judge. Affirmed.

A jury convicted Joseph F. Heffernan of felony possession of child pornography in violation of Penal Code section 311.11, subdivision (a), and misdemeanor possession of narcotics paraphernalia in violation of Health and Safety Code section 11364. Heffernan admitted he had one prior prison conviction (Pen. Code, § 667.5 subd. (b)) and the court found he violated probation. The court sentenced him to prison for four years. Heffernan

appeals, contending the court prejudicially erred by not sua sponte instructing the jury on consciousness of guilt with CALCRIM No. 362. We affirm the judgment.

FACTS

A. *Prosecution's Case*

In 2008, Michael Camp was a tenant at an apartment complex, where he also rented two garages. He gave Heffernan permission to use one of these garages to store tools. Camp did not authorize anyone else to use the garage. Camp did not provide Heffernan with keys to the padlock on the garage door, which he left unlocked, allowing Heffernan to access the garage. However, Camp once saw a different padlock on the garage door that did not belong to him. Camp stored personal belongings in the garage, none of which included computers, computer-related equipment, or compact disks (CDs).

The apartment complex manager received information that someone was possibly residing in the garage, and he asked the police to investigate. When police arrived at the garage, the door was closed but unlocked, and had two padlocks on it. The police found Heffernan asleep on a couch inside the garage. Heffernan did not appear to be under the influence of drugs, but there were several used glass pipes for smoking methamphetamine or cocaine on the table along with a butane gas torch. There was a computer monitor on the table near the couch where Heffernan was sleeping. There was a pay stub in the name of Heffernan in the garage. There were several soft drink cups full of urine interspersed throughout the garage emitting a strong odor.

On top of the couch on which Heffernan was sleeping were several items, including CDs, a camera and a sexual device. The computer monitor screen, when activated, showed a thumbnail cluster of images of naked minors. San Diego Police Detective Susan Righthouse arrived and observed the computer monitor showing an image of a naked girl, between seven and 10 years old, with her legs spread and her hands in front of her vaginal area.

The police seized the computer tower attached to the monitor. After obtaining a search warrant, Righthouse found two connected hard drives inside the computer tower. She found that the nine thumbnail images were all of nude, underage girls, some of whom were engaged in sexual activities with adult males. She also found 18 pages of child pornographic images on the hard drives, 60 child pornographic videos, and a folder with many child pornographic and child erotica photographs. The computer hard drive also contained three pages of photographs of Heffernan.

Forensic examiners determined one of the two hard drives inside the computer tower was registered to "Joe." The other hard drive was registered to "no," but there were six e-mails directed to Joe or Joe Heffernan on it. Also on this hard drive was a bill issued from Sprint to Joseph Heffernan. Additionally, there were 3,175 images located on the hard drive registered to "Joe." These images were in three different folders, and consisted of various types of child pornography. There were also child pornographic movie files in a directory that converted movies to a cellular telephone format, suggesting

the movies were copied from the computer to the cellular telephone. The computer was not password protected, allowing anyone to access the files.

On one of the seized CDs there was a video depicting sexual activity between an adult male and a young girl. The second CD seized from the couch had a file on it named "Joe's music." This CD contained 2700 images of child pornography and some adult pornography. It also contained images of infants and toddlers being digitally penetrated by what appeared to be a male adult hand.

There were also two cellular telephones in the garage, one of which (a blue Blackberry) was connected to the computer found near Heffernan. The screen name on this telephone was "Heffernan." The second telephone showed a username of "Joe Heffernan" or "Joseph Heffernan." Police also found a Bluetooth device used to access the internet through a cellular telephone. One of the cellular telephones had likely used the device to copy a movie from the computer.

B. *Defense Case*[1]

Heffernan testified he arranged with Camp to store tools in Camp's garage. On the day of his arrest, Heffernan went to the garage to pick up the tools he had stored there. Heffernan informed an individual who questioned him that Camp gave him permission to be there.

Heffernan testified he did not lock the garage and had not been at the garage for about three weeks. Heffernan believed the garage had been ransacked since his last visit.

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1 These facts are taken from Heffernan's testimony.

He sat on the couch because he was overwhelmed with a foot infection and the medication he was taking. The next thing Heffernan remembered was being awakened by police officers.

C. *Defendant's Pretrial Statements and Subsequent Testimony*

At the time of his arrest, Heffernan told police the lock on the outside of the garage door belonged to him. At trial, Heffernan denied knowing whether the lock on the garage door admitted into evidence belonged to him. He confirmed he owned a lock inside the garage, and that he asked the officers to use his lock to secure the garage. Later, he released the keys to Camp.

Heffernan told police he used his own lock to lock the garage when he left. At trial, he denied ever locking the garage door when he left.

Heffernan told police he was allowed to and did periodically stay in the garage. At trial, Heffernan denied staying at the garage, and said he lived in Pacific Beach.

Heffernan admitted to police that the used glass methamphetamine pipes were his. At trial, he denied the pipes were his, and asserted he lied to police at the time of apprehension to protect Camp.

Heffernan told police the computers were his, and that "he liked to work on them." At trial, he said he had actually only claimed ownership of some of the computer equipment, including four hard drives. He admitted the Blackberry attached to the computer belonged to him.

DISCUSSION

A. History and Use of CALCRIM No. 362

Before adoption of CALCRIM No. 362, the standard consciousness of guilt instruction was CALJIC No. 2.03, which provided:

> "If you find that before this trial [a] [the] defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which [he] [she] is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

The CJER Mandatory Criminal Jury Instructions Handbook (2008) section 2.113(a), provides at page 118: "Defendant's false or contradictory statements may be considered as a circumstance tending to prove a consciousness of guilt but are not themselves sufficient to prove guilt." Neither CALCRIM No. 362 nor section 2.113 of the Handbook referenced statements made "before" the trial as the relevant statements that would necessitate giving the instruction. However, the instruction continued to be given when defendants made pretrial false or misleading exculpatory statements tending to show a consciousness of guilt.

In *People v. Beyah* (2009) 170 Cal.App.4th 1241, the defendant claimed the jury was prejudiced when the court erroneously gave the instruction based solely on his contradictory testimony. The court stated it does "not endorse the use of CALCRIM No. 362 when the basis for an inference of guilt is false or misleading statements in a

defendant's trial testimony, rather than false or misleading statements made prior to trial." (*Id.* at p. 1251.)[2]

The court doubted the CALCRIM Committee intended the instruction to be used with reference to trial testimony. (*People v. Beyah, supra,* 170 Cal.App.4th at pp. 1248-1249.) The court pointed out that although the instruction "omits the limiting language formerly found in CALJIC No. 2.03, [it] expressly refers to a false or misleading *statement* made by defendant, not to false or misleading *testimony*." (*Id.* at p. 1248.) The *Beyah* court invited the CALCRIM Committee to clarify its intended use of the instruction. (*Id.* at p. 1251.)

CALCRIM No. 362 was revised effective August 2009. The instruction now provides:

> "If [the] defendant made a false or misleading statement *before this trial* relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show (he/she) was aware of (his/her) guilt of the crime and you may consider it in determining (his/her) guilt. [You may not consider the statement in deciding any other defendant's guilt.]
>
> "If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself." (CALCRIM No. 362 (rev. Aug. 2009), italics added.)

The trial court does not have a categorical duty to instruct the jury on false statements indicating a consciousness of guilt. (*People v. Najera* (2008) 43 Cal.4th 1132,

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2 The court did not find that giving a consciousness of guilt instruction based solely on the defendant's trial testimony was prejudicial under the circumstances of that case. (*Beyah, supra* 170 Cal.App.4th at p. 1249.)

1139.) Rather, a trial court has a sua sponte duty to instruct on false statements indicating a consciousness of guilt "under the particular evidentiary circumstances of the case." (*People v. Atwood* (1963) 223 Cal.App.2d 316, 333-334.)

The historical use and development of the instruction show the CALCRIM Committee intended the instruction to apply to a defendant's false or misleading pretrial statements. The consciousness of guilt instruction must be given when there is evidence the defendant intentionally made a false statement prior to trial from which an inference of guilt could be drawn. (CALCRIM No. 362.) The instruction should not be given unless the false statement was exculpatory of the defendant, rather than made to protect someone else. (*Ibid*.)

When the record shows defendant's contradictory statements and the consciousness of guilt instruction would only emphasize defendant's contradictions, the defendant is not prejudiced by the court's failure to instruct with CALCRIM No. 362. (*People v. Atwood*, *supra*, 223 Cal.App.2d at p. 335).

B. Standard of Review

The trial court's judgment will not be set aside on the ground of instructional or evidentiary errors unless a miscarriage of justice has occurred. (Cal. Const., art. VI, § 13.) A miscarriage of justice will be declared only when it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Breverman* (1998) 19 Cal.4th 142, 149.)

C. The "Consciousness of Guilt" Instruction Was Not Required

Heffernan does not clearly state which statements are the false or misleading statements in the record that create a court's sua sponte duty to instruct with CALCRIM No. 362. Heffernan appears to present two different arguments in support of his contention that the trial court erred.

First, Heffernan argues his trial testimony "was both credible and plausible." At trial, Heffernan denied making the inculpatory pretrial statements attributed to him by police. Therefore, a contradictory record was created of his statements prior to trial and his testimony at trial. Heffernan contends the mere existence of contradictory statements is sufficient to warrant a consciousness of guilt instruction, regardless of whether his pretrial statements or his trial testimony was false. However, there is no authority for the proposition that the court has a duty to give a consciousness of guilt instruction when a defendant denies at trial that he made inculpatory statements prior to trial.

The related issues to CALCRIM No. 362 provide that "[t]he false nature of the defendant's [pretrial] statement may be shown by inconsistencies in the defendant's own testimony, his or her pretrial statements, or by any other prosecution evidence." (Related Issues to CALCRIM No. 362 (rev. Aug. 2009).) Inconsistencies *between* defendant's pretrial statements and in-court testimony are not mentioned as warranting giving the CALCRIM No. 362 instruction. We have found no cases or other authority holding this instruction is mandatory as to allegedly untruthful trial testimony. (See CALJIC No. 2.03, CALCRIM No. 362.) "[W]e do not endorse the use of CALCRIM No. 362

when the basis for an inference of guilt is false or misleading statements in a defendant's trial testimony, rather than false or misleading statements made prior to trial." (*People v. Beyah*, *supra*, 170 Cal.App.4th at p. 1251.)

Second, Heffernan argues that "[i]f the jury believed the officers' testimon[ies], it could have construed the statements attributed to [Heffernan] as indicative of his guilt." However, the statements attributed to Heffernan by police testimony were pretrial statements that were inculpatory, not exculpatory. Thus, if the jury believed the officer's testimony, then it must have believed Heffernan made the *inculpatory* statements when arrested, disbelieving his contrary trial testimony. Knowingly making *inculpatory* pretrial statements to police is not the same as making false or misleading pretrial statements that tend to establish consciousness of guilt. Heffernan does not cite any authority suggesting otherwise. It stretches logic to suggest a jury might find a defendant fabricated inculpatory pretrial statements for self-protection.

Heffernan cites *People v. Edwards* (1992) 8 Cal.App.4th 1092, in which testimony of witnesses other than the defendant showed the defendant made false *pretrial* statements. The court reasoned that "[t]he giving of CALJIC No. 2.03 is justified when there exists evidence that the defendant prefabricated a story to explain his conduct." (*Id.* at p. 1103.) There is no such evidence in this case. Making inculpatory statements when arrested is better characterized as making incriminating oral statements, rather than consciously fabricating a story to explain conduct. The trial court properly instructed with CALCRIM No. 358, Evidence of Defendant's Statements, including the required

cautionary language for incriminating pretrial statements. The trial court instructed, "You have heard evidence that the defendant made oral statements before the trial. You must decide whether or not the defendant made any such statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such statements. You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded."

Heffernan does not offer an explanation as to why the jury would believe he would falsely claim to be connected to the incriminating evidence against him. One possible reason a person might make false inculpatory pretrial statements is to protect some other person. In fact, Heffernan testified that when he claimed ownership of the glass methamphetamine pipes, he was lying to protect Camp. However, the bench notes to CALCRIM No. 362 provide the instruction should not be given when the false pretrial statements were made to protect someone other than the defendant. Whatever the reason for Heffernan's inculpatory pretrial statements, we cannot infer he made those statements to protect himself.

Heffernan cites *People v. Atwood*, *supra*, 223 Cal.App.2d 316, in which the court held the error in not giving an instruction on conduct showing the consciousness of guilt was harmless. In that case, police testified the defendant made certain exculpatory statements when apprehended. (*Id.* at p. 321.) At trial, the defendant denied making exculpatory statements. The *Atwood* court stated, "As to the instruction on consciousness

of guilt [citation], since the record *does* show contradictory statements by defendant, the instruction in our view would only emphasize them and to this extent would not be favorable to [the defendant]." (*Ibid.*) Heffernan's pretrial statements were not exculpatory. There was a great deal of evidence linking him with the alleged crimes. Heffernan was not convicted of his crimes based solely on the existence of alleged contradictions in the record. To the extent contradictions existed as a result of Heffernan's in-court denials of his inculpatory pretrial statements, any error in not instructing with CALCRIM No. 362 was harmless.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.